TABLE OF CONTENTS

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 4

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. PETITIONER'S SENTENCE IS NOT SO DISPROPORTIONATE TO HIS CRIME AS TO BE CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT 7

A. Petitioner's Punishment Is Not Cruel and Unusual in Light of the Fact That His Crime Is One of the Most Serious Offense Plaguing American Society 9

B. Severity of Petitioner's Punishment 16

C. Severity of the Punishment in Other Jurisdictions 17

II. THE CONSTITUTION DOES NOT REQUIRE INDIVIDUALIZED SENTENCING IN NON-CAPITAL CASES 20

CONCLUSION 27

TABLE OF AUTHORITIES

Page

Cases:

Barnes v. United States, 777 F.2d 430 (8th Cir. 1985) 11
Broadrick v. Oklahoma, 413 U.S. 601 (1973) 7
Coker v. Georgia, 433 U.S. 584 (1977) 13
Enmund v. Florida, 458 U.S. 782 (1982) 2
Gregg v. Georgia, 428 U.S. 153 (1976) 21
Jackson v. Virginia, 443 U.S. 307 (1979) 10
Lockett v. Ohio, 438 U.S. 586 (1978) 21, 22, 25
McMillan v. Pennsylvania, 477 U.S. 79 (1986) 25
Mira v. Marshall, 806 F.2d 636 (6th Cir. 1986) 25
Mistretta v. United States, 109 S. Ct. 647 (1989) 23
National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) 2
Ohio v. Akron Center for Reproductive Health, 110 S. Ct. 2972 (1990) 7
Pennsylvania v. Davenport, 110 S. Ct. 2126 (1990) 3
Roberts (Stanislaus) v. Louisiana, 428 U.S. 325 (1976) 21
Rummel v. Estelle, 445 U.S. 263 (1980) 7, 15
Solem v. Helm, 463 U.S. 277 (1983) . . . . . *passim*
Spencer v. Texas, 385 U.S. 554 (1967) 26
United States v. Costelon, 694 F. Supp. 786 (D. Colo. 1988) 25
United States v. Goodface, 835 F.2d 1233 (8th Cir. 1987) 25
United States v. Valentin, 569 F.2d 1069 (9th Cir. 1978) 11

Page

United States v. Vizcaino, 870 F.2d 52 (2d Cir. 1989) 24
United States v. Whitworth, No. 85-552 (N.D. Cal. 1985), *aff'd*, 856 F.2d 1268 (9th Cir. 1988) 2
Whitmore v. Arkansas, 110 S. Ct. 1717 (1990) 2
Williams v. New York, 337 U.S. 241 (1949) 25
Woodson v. North Carolina, 428 U.S. 280 (1976) 21, 22
Young v. Miller, 883 F.2d 1276 (6th Cir. 1989) 11

State Statutes:

Ala. Code §§ 13A-5-6(a)(1), 13A-12-231(2), (10), 13A-12-232 19
Ark. Stat. Ann. § 5-64-401(a)(1)(i), (d) 19
Conn. Gen. Stat. § 21a-278(a) 19
Ga. Code Ann. § 16-13-31 . . . . . 19, 20
Idaho Code § 32-2732(a)(1)A 19
Kan. Stat. Ann. § 65-4101 *et seq.* 19
Mo. Rev. Stat. § 195.010 *et seq.* 19
Nev. Rev. Stat. § 453.3395(3) 19
N.Y. Penal Law § 220.21 19
N.C. Gen. Stat. § 90-95(h)(3)(C) 19
N.D. Cent. Code § 19-03.1 *et seq.* 19
Okla. Stat. tit. 63, § 2401 19
S.C. Code Ann. 44-53-370(e)(2)(e) 19, 20
Tenn. Code Ann. § 39-6-401 *et seq.* 19
Tex. Health Code § 481.112 19

Miscellaneous:

American Council of Life Insurance, *1988 Life Insurance Factbook* 17

Page

Beyer, *Boarder Babies in District of Columbia Hospitals: Report of the Mayor's Advisory Board on Maternal and Child Health*, (Sept. 6, 1989) 12
Chasnoff, *et. al.*, *Cocaine Use in Pregnancy, Perinatal Morbidity and Mortality*, Neurotoxicology and Teratology, Vol. 9, (1987) 13
The Detroit Free Press, March 23, 1990 9
The Detroit Free Press, March 24, 1990 16
Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement*, 24 Wake Forest L. Rev. 881 (1989) 13
MacGregor, *et. al.*, *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, Obstetrics & Gynecology, Vol. 74, No. X, 1989 . . . . . 12, 13
Office of National Drug Control Policy, *Leading Drug Indicators White Paper* (Sept. 1990) . *passim*
U.S. Department of Justice, 1988 *Sourcebook of Criminal Justice Statistics* 13
The Washington Post, March 2, 1988 14
The Washington Times, Sept. 4, 1990 . . . . . 11, 14
The Washington Times, Sept. 21, 1990 11
Welch, *Can This Be Life? The Implications of Life Without Parole*, Corrections Compendium (Feb. 1987) 16

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

RONALD HARMELIN,
Petitioner,

v.

THE STATE OF MICHIGAN,
Respondent.

On Writ of Certiorari to the
Court of Appeals of Michigan

BRIEF OF *AMICI CURIAE* THE WASHINGTON LEGAL FOUNDATION, CITIZENS FOR LAW AND ORDER, FAMILIES AND FRIENDS OF MISSING PERSONS AND VIOLENT CRIME VICTIMS, THE MARYLAND COALITION AGAINST CRIME, THE PARENTS ASSOCIATION TO NEUTRALIZE DRUG AND ALCOHOL ABUSE AND THE STEPHANIE ROPER COMMITTEE, INC. IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit law and policy center with more than 120,000 members and supporters nationwide. WLF engages in litigation and administrative proceedings affecting the broad public interest, and has a particular interest in the areas of criminal justice, drug abuse and crime victims' rights. In that regard, WLF has participated as a party

or *amicus* in numerous cases before this Court, as well as in other state and federal courts. *See, e.g., Whitmore v. Arkansas*, 110 S. Ct. 1717 (1990), *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989), and *Enmund v. Florida*, 458 U.S. 782 (1982). In addition, WLF filed a sentencing memorandum with the United States District Court in the espionage case *United States v. Whitworth*, No. 85-552 (N.D. Cal 1985), urging that court to impose a lengthy term of years upon the defendant such that he would serve a *de facto* sentence of life without parole. The term of 360 years with no parole for 60 years was upheld on appeal as not violative of the Eighth Amendment. *United States v. Whitworth*, 856 F.2d 1268, 1289 (9th Cir. 1988).

Citizens for Law and Order (CLO) is a grass-roots organization in the state of California devoted to supporting law enforcement agencies in that state in their efforts against crime. CLO supports measures in the California legislature designed to strengthen the criminal justice system. CLO was founded in 1970 and is based in Oakland.

Families and Friends of Missing Persons and Violent Crime Victims is a national organization based in Seattle, Washington, that provides assistance to the families of kidnapped children and victims of other crimes. It is particularly involved with efforts to protect our nation's youth from becoming involved in crime, and supports efforts by law enforement to safeguard neighborhoods from drug dealers.

The Maryland Coalition Against Crime (MCAC) is based in Baltimore, Maryland, and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. MCAC is currently supporting the adoption of a "Victims' Rights Amendment" to the Maryland Constitution.

The Parents Association to Neutralize Drug and Alcohol Abuse (PANDAA) is a national organization devoted to eliminating drug use among young people. PANDAA works toward this end by sponsoring anti-drug classes and seminars, by distributing informational materials and by helping families with drug abuse problems in finding effective treatment.

The Stephanie Roper Committee, Inc. is a nonprofit organization based in Upper Marlboro, Maryland. It was founded in 1982 by Roberta Roper, the mother of Stephanie, who was kidnapped, raped, tortured and brutally murdered. The Committee is a victims' rights advocacy organization which has supported and proposed legislation responsive to the needs of crime victims. The Committee has previously appeared in this Court as *amicus curiae* in *Pennsylvania v. Davenport*, 110 S. Ct. 2126 (1990).

Amici are all deeply concerned about the vast human destruction caused by illegal drugs, and support stern measures designed to punish drug traffickers. *Amici* feel that criminals of petitioner's ilk represent one of the most serious threats to American society, and that Michigan's mandatory punishment of life without parole for large-scale drug dealing represents the measured and proper judgment of the people of that state. This brief is being filed with the consent of both parties.

STATEMENT OF THE CASE

On October 12, 1986 Ronald Harmelin was arrested in Oak Park, Michigan for possession of illegal drugs, following a traffic stop. At the time of his arrest, he was a one-man drug market. From his person, police consficated marijuana cigarettes, four brass cocaine straws, one cocaine spoon, three vials containing a white powder of suspected cocaine, twelve Percodan

tablets, twenty-five tablets of Phendimetrazine Tartrate, a Morotola beeper, a .38 caliber revolver, and nearly $600 in cash. During an inventory search of his car, police later found a bag containing 672.5 grams (about one and a half pounds) of nearly pure cocaine, $2,900 in cash, a coded address book, and a number of personal toiletries. Michigan Department of Corrections, Presentence Investigation Report on Ronald Harmelin, April 27, 1987.

Petitioner was convicted of possession of over 650 grams of narcotics and possessing a weapon in the commission of that crime. On April 30, 1987, he was sentenced to the mandatory punishment of life imprisonment without parole as required by Michigan's relatively new anti-drug law making the possession, distribution, or manufacture of such large amounts subject to such penalty. MCL § 333.7403(2).

Petitioner's conviction and sentence were affirmed by the Michigan Court of Appeals on April 18, 1989, and leave to file an appeal with the Michigan Supreme Court was denied on January 29, 1990. This Court granted a petition for writ of certiorari on May 29, 1990, limited to the question of whether the sentence violates the Eighth Amendment's proscription against cruel and unusual punishment.

SUMMARY OF THE ARGUMENT

The fundamental issue in this case is whether or not state legislatures have the power to prescribe severe penalties for serious violations of the law. Petitioner is a convicted drug trafficker who shares a personal responsibility for the thousands of deaths in this nation that are directly linked with illegal drugs. By urging reversal of the sentence in his case, petitioner would have this Court adopt a new, extra-constitutional rule that only judges -- and not legislatures -- may determine appropriate sentences upon persons convicted of extremely serious crimes.

In our view, no proportionality analysis under *Solem v. Helm*, 463 U.S. 277 (1983) is required at all, extended or otherwise, for patently serious offenses involving violence, drugs, and similar crimes, regardless of the characteristics of the offender (*e.g.*, first offender), and regardless of what other punishments may or could have been meted out in the jurisdiction in question or in other jurisdictions for similar crimes. Rather, such analysis is constitutionally required, if at all, only where the crime committed is a minor, non-violent or regulatory crime on the order of that committed in *Solem*. Otherwise, lower courts would be faced with continous challenges to sentences, both determinate and discretionary, imposed for all serious crimes by resourceful counsel who, like counsel in the instant case, present statistical comparisons and novel hypotheticals to show some disparity in sentencing practices. The result of such judicial exercise would be the risk that sentencing decisions will be reduced to determining the lowest common denominator rather than allowing the states the flexibility to deal severely with serious criminal behavior.

In any event, petitioner received a sentence that was directly tied to the extreme severity of his crime. Applying this Court's analytical framework set forth in *Solem*, his sentence was not so grossly disproporationate to his crime as to constitute cruel and unusual punishment under the provisions of the Eighth Amendment.

ARGUMENT

At the outset, it should be made clear what the precise question is before the Court in this case. The question presented in the petition and on which review

was granted is "Whether The Mandatory Sentence of Life Imprisonment Without Possibility of Parole Constitutes Cruel and Unusual Punishment." The question, as conveniently rephrased by petitioner in his opening brief, was whether such a sentence is constitutional under the Eighth Amendment when the sentencing authority is not permitted to consider alleged mitigating factors, namely, that the petitioner had "no prior record and . . .was not a drug kingpin." Rephrased, the question suggests that a defendant has a constitutional right to individualized sentencing, a proposition that has been overwhelmingly rejected by this and lower federal Courts, and one that calls into question federal and state determinate sentencing schemes. *See* Question Presented, Pet. Brief at i. Yet, petitioner later concludes his brief by requesting that "this Court should hold that the Michigan sentencing *statute* in this case is unconstitutional," suggesting that the law be struck down on its face. Pet. Brief at 47. (emphasis added).

It is *amici*'s position that the only proper question before this Court is the constitutionality of the sentence as applied in this particular case, rather than the validity of Michigan's law on its face. Indeed, a facial challenge to the constitutionality of any statute is almost impossible to mount, except in the context of the First Amendment, for the challenger would have to argue that no application of the law would be constitutional. *Ohio v. Akron Center for Reproductive Health*, 110 S. Ct. 2972, 2980-81 (1990); *Broadrick v. Oklahoma*, 413 U.S. 601, 610-11 (1973). And while the question presented as revised in the brief is couched in due process terms, no Fourteenth Amendment due process challenge was made in this case. Consequently, the question under review should be properly limited to whether or not the imposition of a life sentence without parole in this particular case is a punishment so grossly disproportionate to the major drug offense for which the

petitioner was found guilty so as to constitute cruel and unusual punishment under the Eighth Amendment. The answer is clearly not.

I. PETITIONER'S SENTENCE IS NOT SO DISPROPORTIONATE TO HIS CRIME AS TO BE CRUEL AND UNUSUAL UNDER THE EIGHTH AMENDMENT.

In *Solem v. Helm*, this Court reviewed the constitutionality of a life sentence without parole imposed on a person who was convicted for merely uttering a "no account" check for $100. Since the defendant in that case had six prior felony convictions, his severe sentence was authorized by a recidivist statute of South Dakota. Although this Court had previously sustained a life sentence with the possibility of parole for a similar minor non-violent crime committed by a recidivist in *Rummel v. Estelle*, 445 U.S. 263, 100 S. Ct. 1133 (1980), the *Solem* Court nevertheless struck down the life sentence without the possibility for parole, concluding that Helm's sentence was "*significantly* disproportionate to his crime, and . . . therefore prohibited by the Eighth Amendment." 463 U.S. at 303 (emphasis added).

In so doing, the *Solem* Court stated that it was guided by the following objective factors: 1) the gravity of the offense and the harshness of the penalty, 2) a comparison of the sentences imposed on other criminals in the same jurisdiction, and 3) a comparison of the sentences imposed for the same crime in other jurisidictions. *Id.* at 291. *Amici* will focus their *Solem* analysis on the first criterion, especially the gravity of the offense prong, which in our view so far outweighs the other factors as to make this Court's resolution of this case a relatively easy matter. For as this Court itself recognized in *Solem*, "[i]n view of the substantial defer-

ence that must be accorded legislatures . . ., a reviewing court rarely will be required to engage in extended analysis to determine that a sentence in not constitutionally disproportionate." *Id.* at 290, n.16. The gravity of the offense in this case is clearly not in the same league as the minor non-violent crimes in *Solem* and *Rummel* which prompted this Court's consideration of the other criteria to determine proportionality under the Eighth Amendment. For while it is true that the difference between the sentence in *Rummel* and *Solem* was the possibility of parole in the former case and not in the latter, that fact is of little, if any, relevance to this case since the underlying crimes in both of those cases were very minor offenses, in stark contrast to the serious crime committed in the instant case.

Other than death penalty cases, which *amici* submit are inappicable to non-capital sentencing (see argument at II, *infra*), petitioner primarily relies upon this Court's decision in *Solem* in claiming that his punishment is cruel and unusual in violation of the Eighth Amendment. While many have questioned the wisdom of *Solem* and some have urged this Court to overrule it,[1] *amici* submit that petitioner's argument may be disposed of even within the framework of that decision, given the extreme severity of petitioner's crime.

A. Petitioner's Punishment Is Not Cruel and Unusual in Light of the Fact That His Crime Is One of the Most Serious Offenses Plaguing American Society.

In his analysis of his offense under *Solem*, petitioner makes an extended effort to minimize the severity of the offense with which he was charged.

---

[1] *See, e.g.*, Brief of *amicus curiae* the Prosecuting Attorneys' Association of Michigan.

Pet. Brief at 16-20. Petitioner claims that "[n]ot to take into account the facts of this particular offense or the history and characteristics of the petitioner is a great miscarriage of justice." Pet. Brief at 16.[2] Petitioner has the effrontery to further claim that his crime was simply a singular "mistake in judgment." Pet. Brief at 33.[3] It would be a far greater miscarriage of justice if this Court were to decide this case without recognizing that petitioner has personal responsibility for a part of the enormous human suffering caused by illegal drugs.

---

[2] *Amici* suggest that this Court's consideration of this case should not extend to the dispension of mercy upon petitioner. Pleas for mercy are best addressed in a clemency petition to the Governor of Michigan. This Court should confine itself to resolving whether or not petitioner's punishment violates the Constitution.

[3] It is hard to believe petitioner's claim that his crime was a "mistake in judgment." When arrested, he possessed all the tools of a veteran drug dealer: a pistol, a coded address book, a beeper, different types of drugs individually packaged for resale, drug paraphernalia and a large amount of cash. This was not a singular event. Petitioner was convicted of a crime in this incident only, but he is indisputably guilty of many more drug crimes during which he went undetected by police. As one judge aptly put it,

> Go out and try to buy a pound [of cocaine]. They'd look at you and laugh in your face. You've got to work at it. It's the idiot who thinks this is a singular event when someone is caught with this amount.
>
> Sure, they may not have criminal records, but these are people who smell out a chance to make a buck selling poisons that murder our babies.

The Honorable Michael Talbot, Detroit Recorder's Court Judge, *The Detroit Free Press*, March 23, 1990.

Ronald Harmelin was a large-scale drug trafficker who delivered narcotics down to mid-level dealers.[4] He has had no lawful source of income for many years. He does not file income tax returns. The $15,000 bill for his trial attorney was paid in cash by an "associate." The pound and a half of *undiluted* cocaine in his possession at the time of arrest was far more than a normal individual could consume, and had a street value of between $60,000 and $100,000. His self-serving claim is that he was a "mule of transport," and not a drug dealer.[5] Even if this Court takes his claim at face value, petitioner was at the very least a courier of death. Viewing this case in the light most favorable to the government,[6] this Court can easily conclude that Petitioner is not some poor illegal immigrant used as an unwitting "mule," but was rather a savvy shark swimming in the ocean of illegal drugs.[7] He may not

---

[4] *Amici's* description of petitioner and the circumstances surrounding his arrest are drawn from the Presentence Report prepared for the trial judge by the Michigan Department of Corrections.

[5] In his brief, petitioner has admitted that his crime was more than simply one of possession of narcotics. By claiming that his role was one of a courier, Pet. Brief at 4, 17, he necessarily concedes that he possessed cocaine *with intent to distribute* to others. Petitioner's self-professed intention to participate in the trafficking of cocaine makes his crime even more serious. Thus, while he was not charged with distribution under Michigan law, it is clear that his actual crime would nevertheless deserve such a punishment. *See Young v. Miller*, 883 F.2d 1276 (6th Cir. 1989).

[6] *Jackson v. Virginia*, 443 U.S. 307 (1979).

[7] Because 650 grams of cocaine is a far greater amount than any drug addict may possess for personal consumption, the punishment petitioner received for mere possession of this amount should be viewed as inferring intent to distribute as an intrinsic part of the
(continued...)

have been a "drug kingpin," as he declaims in his brief, but he surely was a "drug linchpin," without whom drug kingpins would be unable to distribute their poison.

The scourge of illegal narcotics has turned America's major cities into a free-fire zone. Drug dealers' wars, fought with AK-47s, Uzis, 9mm Berettas, and the .38 caliber revolvers like the one that petitioner carried, cause thousands of homicides each year. In the District of Columbia alone, 1989 saw 438 murders, some sixty percent of which were directly related to drug trafficking.[8] Beyond the human costs, the monetary cost of this war has been high. Since 1987 the federal drug law enforcement and abuse budget has grown by fifty-six percent to $5,542,800,000.[9]

Fifty-seven percent of those arrested in the United States for homicide are users of illegal drugs.[10] Drug abusers also include three-quarters of those arrested for burglary, seventy-three percent of the persons arrested for robbery, seventy-one percent of individuals arrested for larceny, and seven out of every ten of those arrested

---

[7](...continued)
crime. *See Barnes v. United States*, 777 F.2d 430 (8th Cir. 1985) (in absence of other evidence, 266 grams of cocaine is an amount large enough for jury to infer possessor's intent to distribute); *United States v. Valentin*, 569 F.2d 1069 (9th Cir. 1978) (mere possession of 208 grams of cocaine sufficient to infer intent to distribute).

[8] "Violence Wracks 2 More Suburbs," *The Washington Times*, Sept. 21, 1990 at A1.

[9] *The Washington Times*, Sept. 4, 1990, at A8. The federal budget for drug enforcement and abuse programs is dwarfed by the drug war budgets of the states upon whom falls the main task of enforcing drug laws.

[10] Office of National Drug Control Policy, *Leading Drug Indicators White Paper* 19 (Sept. 1990).

for possession of stolen property.[11] In Philadelphia and San Diego, eighty percent of the men arrested in the first three months of 1990 tested positive for illegal drugs, as did seventy-nine percent in New York City and seventy-eight percent in Chicago.[12] To claim, as petitioner does, that his crime is "non-violent," and therefore should be deserving of more lenient treatment, is to blink reality.

After advancing the discredited claim that experts have "contended that cocaine [is] not addictive," petitioner goes on to baldly assert that death is not "the natural and inevitable consequence of cocaine." Pet. Brief at 19. If petitioner would take the trouble to visit *any* hospital in *any* major city in America he could view first hand the lethal effects of his handiwork. The human destruction caused by illegal narcotics spares not even infants. At the District of Columbia General Hospital -- only a few blocks from the location of this Court -- 22% of the 2,000 babies born at the hospital in 1989 suffered serious medical complications brought about by their mothers' regular use of cocaine during their pregnancies.[13]

These "crack babies" suffer from a number of birth defects, including deformations such as missing extremities (usually fingers), deformed sex organs and prune belly syndrome.[14] A very high number of

---

[11] *Id.*

[12] *Id.* at 18.

[13] *See generally* Beyer, *Boarder Babies in District of Columbia Hospitals: Report of the Mayor's Advisory Board on Maternal and Child Health*, (Sept. 6, 1989).

[14] The information on drug addiction among newborns is drawn from MacGregor, *et. al.*, *Cocaine Abuse During Pregnancy: Correlation Between Prenatal Care and Perinatal Outcome*, Obstetrics & Gynecology, Vol. 74, No. X, 1989 and Chasnoff, *et. al.*, *Cocaine Use in Pregnancy, Perinatal Morbidity and Mortality*, Neurotoxicology and Teratology, Vol. 9, pp. 291-293, 1987. (continued...)

cocaine-addicted infants also suffer from abnormally low birth weight (the leading cause of infant mortality), meconium aspiration (a fetus' ingestion of its own bodily wastes), and repeated seizures. In addition to numerous cases of permanent and severe brain damage, most crack babies typically suffer from small head circumference, restricting the space in which the brain may normally develop. Despite the heroic efforts of physicians and pediatric nurses, a large number of these children die. Many of those that do survive will live out their lives severely handicapped as a result of their mothers' use of cocaine. There is no reason to believe that many babies born in hospitals in or near Oak Park, Michigan, where petitioner plied his trade, have been spared this horrific suffering.

The slaughter from the drug plague has driven society to demand, and rightly so, strict measures to stem the tide of illegal narcotics. A full thirty-eight percent of the public believes that convicted drug dealers not guilty of a specific murder should be subject to the death penalty.[15] According to Gallup Poll data, the number of persons believing that drug abuse is the

---

[14](...continued)

[15] U.S. Department of Justice, 1988 *Sourcebook of Criminal Justice Statistics*, 223. Nothwithstanding this Court's decision in *Coker v. Georgia*, 433 U.S. 584 (1977), an argument can be made that capital punishment for major drug dealers can be constitutionally applied even where no specific death can be shown to have resulted from that crime. *See* Kamenar, *Death Penalty Legislation for Espionage and Other Federal Crimes is Unnecessary: It Just Needs a Little Re-enforcement*, 24 Wake Forest L. Rev. 881, 890-91 (1989).

most serious problem our nation faces has grown from two percent in 1985 to twenty-seven percent in 1989.[16]

As best they can, law enforcement agencies are responding to this crisis. Drug arrests in the United States have risen from 640,000 in 1985 to 994,000 in 1988.[17] Seizures of illegal drugs are also up sharply. In 1988 the Drug Enforcement Administration and the Coast Guard seized over sixty-seven tons of cocaine, 780 tons of marijuana, and one ton of heroin.[18] Despite this modest success in seizing narcotics, federal, state and local law enforcement agencies remain overwhelmed in the face of a vast demand for illegal drugs. According to Rep. Charles Rangel, Chairman of the House Select Committee on Narcotics Abuse and Control, Americans spent $140 billion on drugs in 1987. This included 60,000 tons of marijuana, 178 tons of cocaine, and twelve tons of heroin.[19]

With illegal drugs so widely available, and with billions of dollars in business available to enterprising and ruthless drug criminals, it is not surprising that people like petitioner are eager to embark on what they see as a quick path to easy money. What is astonishing, however, is that Ronald Harmelin should be surprised at the severity of his punishment. After all, his punishment is based solely upon the enormous pain and suffering that a large amount of cocaine causes: from the crack baby with brain damage to the elderly person

---

[16] *The Washington Times*, Sept. 4, 1990, at A8.

[17] *Leading Drug Indicators, supra*, note 10 at 29.

[18] *The Washington Times*, Sept. 4, 1990, at A8. *See generally The National Narcotics Intelligence Consumers Committee Report*, June 1990.

[19] "GAO Cites Cost of Drug Use in U.S.," *The Washington Post*, March 2, 1988.

robbed for the money to buy dope, from the teenagers mowed down in drive-by shootings to the women who engage in prostitution as a means to support their drug habit.

Petitioner's crime was not directed solely against one person, but rather it was directed against all the people of Michigan, who every day live in the ominous shadow of illegal drugs. Drug dealing -- the crime petitioner is guilty of -- is a crime against humanity. Former Associate Justice Powell summed it up well when he said that "A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault." *Rummel v. Estelle*, 445 U.S. 263, 295, n. 12 (1980) (Powell, J., dissenting).

There is a clear nexus between illegal drugs and other forms of violent criminal behavior. There is an indisputable connection between the business of drug dealers and the anguish of children born addicted to cocaine. There is a direct correlation between petitioner and the suffering of innocents. For the victims of illegal drugs, Michigan is simply doing justice from both a retributive as well as deterrent perspective by keeping Ronald Harmelin behind bars for the rest of his life.

B. Severity of Petitioner's Punishment.

Petitioner makes a highly emotional argument that his sentence of life without parole really "means life without parole" and that because of the punishment meted out on him, his life has been "shattered beyond all hope." Pet. Brief at 5, 8.

Petitioner would like this Court to believe that his sentence means that he will die in prison. While petitioner may not be paroled in the same manner as other Michigan prisoners, the governor of Michigan retains

the power to commute his sentence to one that includes parole. Michigan's drug lifer law is only twelve years old, and almost all of those sentenced under it have been sentenced within the past few years. Hence, they have not seved long enough in order to yet merit consideration of executive commutation of their sentences.[20]

In other states that long ago adopted life without parole sentences almost identical to Michigan's, such as Nebraska and Massachusetts, persons sentenced to "life without parole" routinely have their sentences commuted to life with possibility of parole after lengthy periods of confinement. *See* Welch, *Can This Be Life? The Implications of Life Without Parole*, Corrections Compendium at 8 (Feb. 1987).

Petitioner also asserts that he has been deprived of all hope, and that his life has been destroyed by the sentence imposed upon him. *Amici* are not sympathetic. Nowhere in the Constitution is this Court given the warrant to reduce a sentence because the justices may feel sorry for a convicted criminal. Any sympathy this Court may feel would be better directed toward the innocent victims whose lives have been destroyed by illegal drugs.

If life without the possibility of parole is indeed a qualitively different aspect of the punishment which makes this sentence more severe than all others except the death penalty, then courts would also have to place *de facto* life sentences in that category as well. A 60-

---

[20] According to Michael Hodge, legal adviser to Michigan Governor James Blanchard, a second-degree murderer sentenced to life imprisonment in Michigan typically serves seventeen years of his sentence before release. Since Michigan's drug lifer law is only twelve years old, Hodge has said that it would be inappropriate to begin to consider executive commutations for drug lifers for five more years. "Lawmakers Quietly Consider Change," *The Detroit Free Press*, March 24, 1990, at 7E.

year old drug dealer who is given a 60-year prison term, even with the possibility of parole after serving one-third of that time, has been effectively given a life sentence. Here, petitioner was 42-years old when he was convicted; according to actuarial tables, his life expectancy is approximately is 30 more years. American Council of Life Insurance, *1988 Life Insurance Factbook* 98. Does that mean any term of years greater than the defendant's life expectancy is a severe sentence under the *Solem* analysis? If so, what about a 5-year mandatory term sentence imposed on a first time offender who is suffering from AIDS or has a terminal illness where every medical prognosis was that the person had only a year to live? That sentence would surely constitute a life sentence without the possibility of parole. Such a defendant could just as easily argue as petitioner, if not even more so, that "he will die in prison," and that he will not be able to be "reunited with . . . his loved ones . . . making up for lost time." Pet. Brief at 32. Such pleas, *amici* submit, are best made to the executive branch in clemency or commutation proceedings rather than to the courts.

C. Severity of the Punishment in Other Jurisdictions.

In his listing of other states' maximum sentences for possession of 650 grams of cocaine, petitioner often compares apples with oranges. Michigan's drug lifer law is designed to punish not solely the possession of cocaine, but also possession *with intent to distribute*.[21]

---

[21] Petitioner has admitted in his own brief that he did not merely possess the 672 grams of cocaine, but instead intended to distribute and transfer the drugs to others. *See* note 5, *supra*. Thus, the

(continued...)

A large number of the state sentences cited by petitioner in his appendix as authorized by other states are for possession only. Petitioner fails to make it clear that the separate penalties for possession with intent to distribute make the true punishments of those states much higher.

The legislative history of the statute indicates that the law was designed to punish traffickers, not just possessors, and that the penological goal was one of incapacitation:

> The bill would ensure that persons convicted of drug dealing spend substantial periods of time in prison. By keeping drug dealers off the streets for longer periods of time, it will help to reduce illicit drug activity.

Argument for Passage of the Drug Lifer Law, Wayne State University, Analysis of Michigan H.B. 4190, March 16, 1977, p. 3, reproduced at Pet. App. 12-13. And as previously noted, possessing more than 650 graams of cocaine easily suggests an intent to distribute the drug. *See* note 7, *supra*.

Michigan's drug lifer law was enacted in the full knowledge that the proposed penalties were tough, yet the legislature felt that the damage caused by illegal drugs was so severe as to merit stiff punishment:

> All of society is a victim of the illicit drug scene. Not only does widespread narcotic addiction cause a serious loss of human resources, but black-market drug dealing creates a spiral of drug-related crime. The magnitude of

---

[21](...continued)
comparison of his crime with the crime of simple possession is entirely inappropriate.

> the narcotics problem in Michigan necessitates tougher law enforcement policies. *The penalties imposed by the bill for major drug dealing are severe, but they are not inappropriate in terms of the harm drug dealers do to society.*

Id. at 2-3 (emphasis added).

This law is not one aimed at the casual user of cocaine. Indeed, no casual addict could afford the $60,000 to $100,000 cost of the 672 grams of cocaine that petitioner possessed. Rather, this law has its effect on those -- like petitioner -- who are engaged in the criminal business of drug trafficking.

Petitioner's sentence, therefore, should only be compared with other jurisdictions' sentences for drug trafficking, not with simple drug possession. In this respect, Michigan's law, while tougher than other jurisdictions, is not egregiously so. Several jurisdictions subject first offenders to life and life without paroie sentences for drug trafficking,[22] and many more provide for lengthy mandatory sentences that exceed the natural life expectancy of petitioner.[23]

---

[22]These jurisdictions include Alabama, Arkansas, Connecticut, Idaho, Kansas, Missouri, Nevada, New York, North Dakota, Oklahoma, Tennessee, and Texas. *See* Ala. Code §§ 13A-5-6(a)(1), 13A-12-231(2), (10), 13A-12-232 (life without parole); Ark. Stat. Ann. § 5-64-401(a)(1)(i), (d); Conn. Gen. Stat. § 21a-278(a); Idaho Code § 32-2732(a)(1)A; Kan. Stat. Ann. § 65-4101 *et seq.*; Mo. Rev. Stat. § 195.010 *et seq.*; Nev. Rev. Stat. § 453.3395(3); N.Y. Penal Law § 220.21; N.D. Cent. Code § 19-03.1 *et seq.*; Okla. Stat. tit. 63, § 2401; Tenn. Code Ann. § 39-6-401 *et seq.*; and Tex. Health Code § 481.112.

[23] If petitioner would have been sentenced in many of the states where his crime is not punishable by life imprisonment, his mandatory sentence for trafficking over 670 grams of cocaine may approach or exceed his life expectancy, thereby resulting in a *de*
(continued...)

Because we have a federal system of government, one state will always have the distinction of being toughest in its treatment of persons violating a certain law. While Florida courts often impose the death penalty for first degree murder, courts in New York are limited by law to a sentence of 25 years to life. Does this mean that the death penalty is unconstitutional because Florida may punish murderers more harshly than does New York? Of course not. Michigan has enacted the nation's toughest law against large-scale drug trafficking. It has done this precisely because the people of Michigan want the merchants of drug death to be removed from society permanently.

Petitioner has no one to blame but himself for his predicament. He brought his life sentence upon himself by his own role in drug trafficking, a role that shows utter disregard for human life.

II. THE CONSTITUTION DOES NOT REQUIRE INDIVIDUALIZED SENTENCING IN NON-CAPITAL CASES.

Petitioner and his *amici*[24] claim that petitioner's sentence was cruel and unusual because the Eighth Amendment requires sentences imposed by trial courts for non-capital crimes must be individualized to fit the

---

[23](...continued)
facto life sentence. *See, e.g.*, Ga. Code Ann. § 16-13-31 (mandatory minimum 25 year sentence for trafficking in more than than 400 grams of cocaine); N.C. Gen. Stat. § 90-95(h)(3)(C) (35 years mandatory minimum for trafficking 400 grams or more); S.C. Code Ann. 44-53-370(e)(2)(e) (25 year minimum for trafficking more than 400 grams). This list, of course, does not include the many states where he could have received a discretionary sentence of longer than 30 years.

[24]*See* Brief of *amici curiae* National Association of Criminal Defense Lawyers, *et. al.*

specific circumstances of the criminal and his crime. This argument is utterly without merit. Neither the Constitution nor the decisions of this Court require the tailoring of non-capital sentences to the individual defendant.

Petitioner spends a large portion of his brief trying to establish the curious notion that a sentence of life in prison without parole -- with the people of Michigan paying for his room, board, medical care, and recreational facilities -- is equivalent to a sentence of death by electrocution. Pet. Brief at 21-27. Having made this argument, petitioner would then have this court fashion a new, extra-constitutional rule that would mandate that the imposition of tough non-capital sentences be governed by legal standards identical to death sentences.

This Court has applied the requirement of individualized sentencing only in the context of death penalty cases. *See e.g. Gregg v. Georgia*, 428 U.S. 153 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978).

Chief Justice Burger's opinion in *Lockett* is especially instructive on this point:

> [L]egislatures remain free to decide how much discretion in sentencing should be reposed in the judge or jury in noncapital cases...
>
> We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes.

Id. at 604-05.

While petitioner goes to great lengths to equate his mandatory life sentence with that of a mandatory death sentence, this Court's decisions in death penalty cases

have consistently set forth that the difference between incarceration and execution is so great that individualized treatment is necessary only for those subject to execution:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponsing difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (opinion of Stewart, Powell and Stevens, JJ.); *see also Lockett v. Ohio*, 438 U.S. at 604 (plurality opinion).

In his argument that the Constitution requires individualized sentencing in non-capital cases, petitioner would have this Court mandate individualized sentencing, a concept which has been specifically rejected by numerous states as well as the Congress of the United States. In enacting the Sentencing Reform Act of 1984, the Congress eliminated individualized sentencing in non-capital cases and enacted a system which removes virtually all sentencing discretion from the hands of federal judges.[25] The national trend in sentencing, as reflected in the federal sentencing scheme and in many states for serious, non-capital crimes, is moving sharply away from individualized tailoring of sentences and toward determinate sentences. Adoption of petitioner's argument would lead this Court to require mandatory appellate review of all non-capital sentences. Not only is this contrary to the adopted

[25] See *Mistretta v. United States*, 109 S. Ct. 647 (1989).

policy of the federal government and of many states, it is an argument that this Court has already rejected. *Solem*, 463 U.S. at 290, n.16.

Adhering to this Court's decision in *Solem*, lower federal courts have consistently ruled against claims made by non-capital defendants who demand individualized sentencing in the manner constitutionally required for capital defendants. The United States Court of Appeals for the Second Circuit, for example, recently rejected the appeal of a convicted drug offender who attacked the non-individualized nature of his sentence, as mandated by the Sentencing Guidelines. Like petitioner here, appellant in that case relied upon this Court's decisions in various death penalty cases to claim that he was constitutionally entitled to individualized sentencing based on his personal characteristics and the circumstances of his crime. The court did not accept this reasoning:

> We reject, given the Supreme Court's capital punishment cases and their language, appellant's argument that it would be arbitrary to distinguish between capital and non-capital cases in this context. . .
>
> In the end, we hold that there is no constitutional right to judicial discretion in individualized sentencing.

United States v. Vizcaino, 870 F.2d 52, 55-56 (2d Cir. 1989) (citations deleted). *See also United States v. Fox*, 889 F.2d 357 (1st Cir. 1989) (no right to individualized sentencing); *United States v. Goodface*, 835 F.2d 1233 (8th Cir. 1987) (individualized consideration not required when sentence is mandatory); and *United States v. Costelon*, 694 F. Supp. 786 (D. Colo. 1988) (Congress has constitutional power to enact mandatory sen-

tences that remove all discretion from sentencing judges).

Indeed, in the due process context, the Court of Appeals for the Sixth Circuit has held that in passing sentence on a convicted felon with no prior criminal record, a state court's imposition of a maximum sentence -- imposed *even without a presentence investigation* -- does not offend constitutional norms. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986).[26]

While some decisions of this Court have cited alleged benefits of individualized and discretionary sentencing in non capital cases,[27] this Court has nevertheless upheld sentences of imprisonment imposed pursuant to mandatory sentences, rejecting the notion that mandatory sentencing violates the requirements of the Constitution. *See McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

Petitioner's equation of life in prison with death is supported by no authority. Instead, he uses emotionalism to shroud his argument in the cloak of his preferred system of penology, one which would constitutionally mandate "good time credits" and early parole as necessary to avoid the imposition of cruel and unsusal punishments. Even if, for the sake of argument, petitioner's lenient system did have merit, there is no legal reason for it to be constitutionally required. If petitioner does not like Michigan's sentencing scheme, his proper remedy is to lobby the Michigan legislature to change the law, or to seek a commutation.

---

[26] While petitioner's argument is advanced solely under the Punishments Clause of the Eighth Amendment, his reliance upon death penalty cases -- in which the arguments are often framed in the due process context -- makes some amount of due process consideration useful.

[27] *See Williams v. New York*, 337 U.S. 241 (1949) and *Lockett*, 438 U.S. at 602-03 (plurality opinion). As previously noted, Chief Justice Burger's plurality opinion in *Lockett* specifically recognized that individualized sentencing is *not* constitutionally required in the non-capital context.

Regardless of whether or not this Court agrees with the wisdom of Michigan's "drug lifer" law, it is well within the power of state governments to proscribe and severely punish conduct which so devastates the fabric of society. The observation of Mr. Justice Stewart on the availability of life sentences for felony recidivists in Texas illustrates this point well:

> If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. . . [T]he question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court.

Spencer v. Texas, 385 U.S. 554, 569 (1967) (Stewart, J., concurring).

Petitioner's attempt to read his personal preferences into the Constitution should be rejected.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision of the lower court be upheld.

DANIEL J. POPEO
PAUL D. KAMENAR
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION*
1705 N Street, N.W.
Washington, D.C. 20007
(202) 857-0240

September 24, 1990

* *Amici* wish to extend their appreciation to Christopher A. Sterbenz, third-year student at the Washington College of Law of American University, for his extensive assistance in preparing this brief.